

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

TITIO CONTRACTORS, INC.

Respondent

and

INTERNATIONAL UNION OF PAINTERS  
AND ALLED TRADES, AFL-CIO,  
DISTRICT COUNCIL 51

Cases 5-CA-119008  
5-CA-119096  
5-CA-119414  
5-CA-123265  
5-CA-129503  
5-CA-131619  
5-CA-134285

Charging Party

**RESPONDENT'S OPPOSITION TO GENERAL  
COUNSEL'S MOTION OR PARTIAL  
SUMMARY JUDGMENT**

In its Motion for Partial Summary Judgment the General Counsel incorrectly asserts that the Board has already addressed and decided that the issue of Maryland Environmental Services' ("MES") position on the reinstatement of the five (5) discriminatees that worked for Respondent, Tito Contractors, Inc. ("Tito"), at the MES facility and therefore Tito cannot relitigate that issue in this proceeding. The issue, however, has not been decided or ever litigated, and the General Counsel points to no decision on the issue. As such, the issue is ripe for adjudication in this proceeding.<sup>1</sup>

As set forth in Respondent's Amended Answer, the Tito-MES government contract contained a provision that based on verbal directive from MES a Maryland agency, Tito had to

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<sup>1</sup> General Counsel points only to the termination of the (5) employees work at the MES facility for Tito. It does not address the Remedy/Order which is at issue here, not the reasons for termination. The issue here involves MES' position or reinstatement to an MES controlled facility. The Board acknowledged this separate issue when it conditioned reinstatement on MES' approval of such reinstatement. Tito's obligation was to request that MES permit reinstatement, acknowledging that Tito had no control over the issue.

remove any of its employees at the MES facility. MES was well aware of the ALJ's Order of Reinstatement of the 5 employees yet MES affirmatively stated to Tito that it would not permit the 5 employees to return to an MES facility to work. Attached hereto as Exhibit 1 is a true and correct copy of a letter from MES confirming it would not allow any of the 5 employees to return to an MES facility. MES, not Tito, controlled access to its facilities and, as such, MES had independent grounds to bar access for work purposes to the 5 employees. The adjudication of this issue necessarily impacts any back-pay award to the 5 employees, including whether the back-pay period is tolled and what is the actual back-pay period. These issues have not been litigated, much less decided by the Board. As set forth in the Amended Answer, MES is a state governmental agency - - outside the jurisdiction of the Board. Tito had no other recycling jobs outside of MES at the time of the employees' discharge.<sup>2</sup>

The Board's Order at 2(b) states:

Within 14 days from the date of the Board's Order, notify Maryland Environmental Services in writing that it requests the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Sanchez to their former jobs at its Shady Grove (Derwood), Maryland facility, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Board Order at p.8.

The Board specifically conditioned the remedy on notification and action by MES. This compliance issue has not been litigated. To foreclose the issue on a motion for partial summary judgment would be improper - - and would surely result in continued appeals - - something a summary disposition is aimed at avoiding. Tellingly, the General Counsel omits that portion of

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<sup>2</sup> Tito lost its MES contract and currently has no recycling employees.

the Board's Remedial Order regarding notification to MES, and only points to the underlying decision on the terminations, which are not at issue in this proceeding.

The above-cited Order necessary conditions reinstatement and the remedies flowing from it on approval from MES. This is so because MES controls access to its facility and is the de-facto joint employer over the employees - - even though MES is not subject to Board jurisdiction. Indeed, MES also employs its own recycling employees, and the discriminates could have applied directly to work for MES. At a compliance hearing Tito anticipates having an MES representative testify as to the Board ordered remedy. Again, this is distinct from the issues at the ULP hearing.

Both the Board and the ALJ conditioned the remedy on MES' position. While the General Counsel may have a different interpretation of the Order, that remedial issue has not been litigated and summary disposition is therefore improper.<sup>3</sup>

According to the Board's own Compliance Manual, the backpay period is '[t]he period during which backpay liability accrues, beginning when the unlawful action took place and **ending** when a valid after of reinstatement is made or when the backpay period is **tolled** for other valid reasons ... .' Compliance Manual 10536.2 (emphasis added). The Compliance Manual further cautions that "[t]here are, however, situations in which reinstatement is not appropriate and is instead precluded. Where respondent contends that reinstatement is not appropriate, it is the responsibility of the Compliance Officer to investigate the situation and recommend a Regional determination." Compliance Manual 10532.1. Indeed, "when it is determined that reinstatement is precluded, backpay is tolled as the date it was foreclosed." Compliance Manual 10536.2. Here, it is unclear if the Regional Compliance Officer if the Regional Compliance Officer undertook such an inquiry. According to evidence and testimony that will be elicited from the 5 discriminates

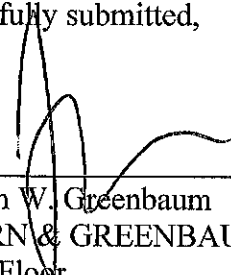
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<sup>3</sup> Moreover, MES' actions or assent is not within the direct knowledge of Respondent and it would require testimony from MES at a compliance hearing.

the backpay period would be tolled as of the date reinstatement was foreclosed. Again, this issue has not been litigated or decided. See *F.W. Woolworth Company*, 90 NLRB 289 (1950) (“backpay period is from the date of discriminatory action to the date of a proper **offer** of reinstatement”). (Emphasis added).

Accordingly, the issue of the scope of the backpay period in light of the Board’s inclusion of MES action in its Remedial Order, which has not been litigated, is ripe for the compliance hearing. Partial Summary Judgment is therefore inappropriate.

Respectfully submitted,



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Counsel for Respondent,  
Tito Contractors, Inc.

cc: All Parties and Counsel of Record

## **EXHIBT 1**

BRIAN E. FROSH  
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February 4, 2015

**BY EMAIL AND REGULAR MAIL**

Jonathan W. Greenbaum, Esq.  
Corburn & Greenbaum  
1710 Rhode Island Avenue, N.W.  
Washington, D.C. 20038

Re: Maryland Environmental Service  
Tito Contractors, Inc.

Dear Mr. Greenbaum:

In accordance with our conversation the following sets forth the position of Maryland Environmental Service ("MES") concerning the return of certain former employees of Tito Contractors, Inc., to the MES operated Montgomery County Resource Recovery Facility ("Facility").

1. Maria/Elena Chavez: MES does not want Ms. Chavez to return to the Facility. MES asked that Ms. Chavez be removed from the Facility because Ms. Chavez exhibited aggressive behavior on several occasions toward Tito employees and also toward MES employee Juana Rosales.
2. Aracely Ramos: MES does not want Ms. Ramos to return to the Facility. MES asked that Ms. Ramos be removed from the Facility because of poor job performance. Specifically Ms. Ramos was leaving materials on the sorting line which was part of her job requirements.
3. Reyna Sorto: MES does not want Ms. Sorto to return to the Facility. MES asked that Ms. Sorto be removed from the Facility because of poor job

performance. Specifically Ms. Sorto was observed on numerous occasions working at an inadequate pace to keep up with her job requirements.

4. Yasmin Ramirez: MES does not want Ms. Ramirez to return to the Facility. MES asked that Ms. Ramirez be removed from the Facility because of poor job performance. Specifically Ms. Ramirez was observed on numerous occasions of failing to sort materials as required by her job.
5. Maria Sanchez: MES does not want Ms. Sanchez to return to the Facility. MES asked that Ms. Sanchez be removed from the Facility because of poor job performance. Specifically Ms. Sanchez was observed on numerous occasions failing to sort materials as required by her job.

Please contact me if you have any questions at 410 729 8245 or  
wsell@menv.com.

Sincerely,



William J. Selle  
Assistant Attorney General  
Maryland Environmental Service